(10)

No. 96-1829

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May an Indian tribe, or the United States on the tribe's behalf, recover in quasi-contract from a State and a county taxes paid pursuant to state law by a third-party taxpayer that has waived any entitlement to a refund?

PARTIES

All parties are listed in the caption.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The final opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 92 F.3d 826 and 98 F.3d 1194 and reproduced commencing at Pet. App. 1. Prior decisions in this matter by the court of appeals are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), and reproduced commencing at Pet. App. 167 and 169; at 819 F.2d 895 (1987) and reproduced commencing at Pet. App. 88; and at 969 F.2d 848 (1992) and reproduced commencing at Pet. App. 58. A prior summary affirmance of the court of appeals' 1987 decision is reported at 484 U.S. 997 (1988) and reproduced commencing at Pet. App. 87.

The opinion of the district court is unreported and reproduced commencing at Pet. App. 17. Prior reported opinions of the district court in this matter that were the subject of review by the court of appeals appear at 469 F. Supp. 154 (1979), which is reproduced commencing at Pet. App. 197; and at 657 F. Supp. 573 (1985), which is reproduced commencing at Pet. App. 110. An unreported opinion of the district court reviewed by the court of appeals in its opinion reported at 969 F.2d 848 (1992) is reproduced commencing at Pet. App. 67.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 6, 1996, and

rehearing was denied on February 21, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter presents a question of federal common law. Statutory provisions involved include the Omnibus Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g, which is reproduced at Pet. App. 230-33, and the Montana coal severance and gross proceeds taxes as enacted by 1975 Mont. Laws chapter 525, which are reproduced at Pet. App. 234-42.

STATEMENT OF THE CASE

This case began in 1978 when respondent Crow Tribe challenged the validity of two tax statutes enacted by the Montana legislature several years earlier: the Montana coal severance tax and the Montana gross proceeds from coal tax. 1975 Mont. Laws ch. 525, §§ 1-12. The taxes were never imposed on the Tribe. They instead were imposed on and paid by Westmoreland Resources, Inc., a corporation mining coal held in trust for the Tribe pursuant to a lease under the Omnibus Mineral Leasing Act of 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). The coal mined by Westmoreland underlies an area known as the ceded strip whose surface lands are outside the Crow Reservation. After nine years of litigation, the tax statutes were held preempted by the court of appeals

because, in relevant part, they "had at least some negative impact on the coal's marketability" and because the taxes were not "narrowly tailored" to achieving legitimate state interests. *Crow Tribe v. Montana*, 819 F.2d 895, 900, 902 (9th Cir. 1987) ("*Crow II*"), *aff'd mem.*, 484 U.S. 997 (1988) (Pet. App. 100, 105).

On remand following *Crow II*, the Tribe and respondent United States, which had intervened as a plaintiff in 1983, filed amended complaints seeking recovery of approximately $58 million in taxes paid by Westmoreland and prejudgment interest on that amount which respondents estimated at the subsequent trial to exceed $300 million. Westmoreland paid these taxes without initiating any proceedings provided under Montana law for recovery of taxes alleged to have been assessed unlawfully. Westmoreland later entered into a settlement agreement with petitioners under which it waived all claims to the taxes' recovery. The issue now is the propriety of the Ninth Circuit's judgment directing that Westmoreland's taxes be refunded to respondents under a federal common law claim for money had and received notwithstanding this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

I. THE CEDED STRIP

Under the May 7, 1868 Treaty of Fort Laramie, 15 Stat. 649 (1868), eight million acres of land were set aside for the Crow Indian Reservation now located in the State of Montana. Pet. App. 114 (FOF ¶ 4). The Reservation was reduced in size by several cessions of land, including the Act of April 27, 1904, 33 Stat. 352, that removed over 1.1

million acres. *Id.* The land subject to the 1904 Act became known as the ceded strip, and virtually all of its surface area eventually was homesteaded by non-Indians, with the sales proceeds paid to the United States and held in trust for the Tribe, or conveyed to Montana for school trust purposes. *Crow II*, 819 F.2d at 896 (Pet. App. 91); Pet. App. 114-16 (FOF ¶¶ 7, 13, 14). Ownership of the subsurface mineral estate underlying disposed-of lands, however, was retained by the United States. Pet. App. 116 (FOF ¶ 15); *id.* 152 (COL ¶ III(c)). The Tribe retained beneficial ownership of undisposed-of ceded lands, and under the Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121, such lands – which totaled approximately 10,000 acres – were restored to reservation status. Pet. App. 117-18 (FOF ¶ 20); *see Ash Sheep Co. v. United States*, 252 U.S. 159, 163-66 (1920) (describing nature of the interest in the ceded lands retained by the Tribe under the 1904 Act).[1]

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[1] The district court construed the 1958 Act as also restoring to tribal ownership the undisposed-of mineral estate but not returning that estate to "reservation status." Pet. App. 152-54 (COL ¶ III(e)-(g)). The court of appeals in *Crow II* disagreed, holding that the mineral estate underlying the ceded strip was a component of the Reservation. 819 F.2d at 898 (Pet. App. 94-95). It is unclear whether the court of appeals' conclusion was predicated on the 1958 Act, since it deemed controlling under law-of-the-case principles a comment in its prior decision in *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir.) (*"Crow I"*), *cert. denied*, 459 U.S. 916 (1982), that "the revenues may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself." 650 F.2d at 1117 (Pet. App. 195). The *Crow I* opinion did not discuss the 1958 Act or otherwise explain why the Tribe's mineral resources, to the extent those resources underlie the ceded strip, constitute a component of the Reservation.

No dispute exists that "[s]ince 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip." Pet. App. 123 (FOF ¶ 37); *see also Ash Sheep*, 252 U.S. at 163-66; *Crow II*, 819 F.2d at 898 (Pet. App. 94-95 & n.1). These services include "general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education." Pet. App. 123 (FOF ¶ 38). The Tribe provides little or no governmental services. Pet. App. 38 (FOF ¶ 65); *id.* 128 (FOF ¶ 58).

II. WESTMORELAND'S MINING OPERATIONS WITHIN THE CEDED STRIP

Among the minerals underlying the ceded strip are substantial coal deposits. Pet. App. 114 (COL ¶ 6). In 1972 the Tribe and Westmoreland entered into a lease pursuant to the Omnibus Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g (Pet. App. 230-33), to produce coal on the ceded strip. Pet. App. 121 (FOF ¶ 30); Defs. Ex. 532. That lease was superseded in 1974 by an amended lease and accompanying settlement agreement. J.A. 6, 39. The district court found the amended lease's royalties, initially set at the greater of 35 cents per ton or 6 percent of the f.o.b. mine price with provision for an increase in future contracts, "were recognized at the time as being among the highest anywhere" (Pet. App. 146 (FOF ¶ 126)), and the settlement agreement stated that the Tribe deemed the amended lease and associated documents as "satisfactory in that they provide the financial, economic and social protections that the Tribe deems

necessary" (J.A. 44). Westmoreland commenced production under the lease in 1974. Pet. App. 122 (FOF ¶ 34).

Westmoreland is the only coal producer within the ceded strip. Pet. App. 19 (FOF ¶ 8). On-site regulation of its facility has been, and remains, a function performed largely by the Montana state agency responsible for mine regulatory matters. Pet. App. 130-31 (FOF ¶¶ 60-64). Since 1990 that regulatory responsibility has been exercised in accordance with a memorandum of understanding between the agency and the United States Department of the Interior, Office of Surface Mining, under which the state agency performs "lead analyses and initial work" that is reviewed by the federal agency for concurrence purposes. II Apr. 19, 1994 Tr. 242:6 - 243:2; Defs. Ex. 523.

III. WESTMORELAND'S STATE TAX PAYMENTS AND THEIR USES

The Montana coal severance and gross proceeds taxes became effective on July 1, 1975. 1975 Mont. Laws ch. 525, §§ 1-12 (codified as amended at Mont. Code Ann. §§ 15-23-701 to -707 & §§ 15-35-101 to -205 (1997)) (Pet. App. 234-41); *see* Pet. App. 23 (FOF ¶ 25). As initially enacted, the severance tax contained a tax rate schedule based on heating quality and type of mining operation, with a tax rate of 30 percent of the "contract sales price" generated by Westmoreland's coal production. 1975 Mont. Laws ch. 525, §§ 2, 3 (Pet. App. 236-37); Pet. App. 25 (FOF ¶ 31); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612-13 (1981). The tax was paid quarterly to the State and distributed into various funds for

current expenditure and into several trust funds where only income and interest were available for expenditure. Pet. App. 23-24 (FOF ¶¶ 27-29). During the period for which respondents have sought recovery, Westmoreland paid approximately $46.8 million in severance taxes with respect to coal subject to the tribal lease, of which amount 61 percent, or $28.5 million, was expended for current use and the remainder placed into the trusts. Pet. App. 24 (FOF ¶ 29).[2] The cost of these tax payments was passed on contractually by Westmoreland to electric utilities purchasing its coal. Pet. App. 30 (FOF ¶ 44); *id.* 145 (FOF ¶ 120).

The gross proceeds tax is imposed annually by the county in which the mining activity occurs. 1975 Mont.

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[2] The trusts were the coal trust fund established under article IX, section 5 of the Montana Constitution and two statutory trusts, one for education and the other for fish, wildlife and parks-arts council ("FWP") purposes. J.A. 327-29. The apportionment between current expenditure and trust fund payments from Westmoreland's taxes was:

Year	Tax Amount	Coal Trust	Educ. Trust	FWP Trust
1976	$5,282,763.01		$528,276.30	$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	$1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,036,003.87	748,478.01	187,119.50
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,994.54
	$46,811,028.54	$13,566,370.22	$4,509,029.55	$859,769.61

Pet. App. 24 (FOF ¶ 29). The corpus of the education trust was expended in 1991. J.A. 328.

Laws ch. 525, § 10 (codified as amended at Mont. Code Ann. § 15-23-702 (1997)) (Pet. App. 241-42). During the period relevant here, the coal producer was required to report the dollar amount of the gross yield or value of its production, calculated in the same manner as the "contract sales price" for severance tax purposes, to the Montana Department of Revenue which then certified the amount to the county assessor. The tax amount then was determined by application of the county's property tax millage rate for the year in question. Pet. App. 25-26 (FOF ¶ 33); *id.* 138-39 (FOF ¶ 98). Westmoreland's mine is located within Big Horn County, and Westmoreland paid approximately $11.4 million in gross proceeds taxes with respect to coal mined under the tribal lease between 1975 and 1986. Pet. App. 26-27 (FOF ¶ 35). Of this amount, $3,060,345.17 was disbursed to the County. The balance, $8,368,769.09, was distributed to other taxing jurisdictions for which the county treasurer acted as a depository. Defs. Ex. 614 at 106. Ninty-one percent of the balance, or two-thirds of the total tax amount paid, went to school districts serving children within the County, including children residing on the Crow Reservation. *Id.* The percentage of Indian children within the County's public schools averaged 58.8 percent between 1974 and 1990. *Id.* at 10. As with the severance tax, the cost of the gross proceeds tax payments was passed on by Westmoreland to the utilities that purchased the coal.

Westmoreland paid the severance and gross proceeds taxes without invoking available state law procedures to challenge its obligation to do so. Pet. App. 37 (FOF ¶ 60); *see also* Pet. at 3 n.1 (describing tax protest procedures available to Westmoreland). Not only did Westmoreland

fail to invoke available state law refund procedures, but it also entered into a settlement agreement with Montana and Big Horn County in 1991. J.A. 294; *see* Pet. App. 37 (FOF ¶ 61). Westmoreland agreed to dismiss a cross-claim (J.A. 206-07) filed in the proceeding below against the State and the County seeking recovery of previously paid severance and gross proceeds taxes and to "abandon[], waive[] and otherwise disclaim[] any claim of entitlement for refund of [such] taxes." J.A. 295. In return, Westmoreland received a payment of $50,000 from Montana and the County. *Id.*

IV. THE 1976 TRIBAL COAL TAX CODE AND WESTMORELAND

In January 1976 the Tribe adopted a tax code that imposed a 25 percent severance tax on "all persons engaged in or carrying on the business of coal mining within the boundaries of the Crow Indian Reservation." J.A. 81. The term "boundaries of the Crow Indian Reservation" was defined to include the ceded strip. *Id.* Because the Crow tribal constitution grants the Tribe only the power to impose taxes or license fees on nonmembers "doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior" (Defs. Ex. 526 at 4), the tax code was submitted to the Department of the Interior for review and approval. Westmoreland opposed approval of the tribal code to the extent it applied to the ceded strip, contending in part that the tribal constitution did not permit the Tribe to tax non-reservation activities. Pet. App. 31 (FOF ¶ 48); *see* Defs. Exs. 536-38, 540. In 1977 Department of

the Interior officials approved the taxation code for application to the Reservation but specifically disapproved it for application to the ceded strip. Pet. App. 143-44 (FOF ¶ 114); *see* J.A. 217-18, 223. The Tribe did not seek judicial review of this decision but instead attempted unsuccessfully to amend its constitution to satisfy the Department's objection. Defs. Exs. 542, 543. The inapplicability of the tribal tax to Westmoreland was uncontested during the 1976 through 1982 period when all of the severance taxes and most of the gross proceeds taxes now sought were paid to petitioners. Pet. App. 144 (FOF ¶ 117).[3]

Westmoreland's concern over the validity of the tribal tax was motivated by two considerations: avoiding concurrent taxation by the Tribe and Montana and inability to pass on to its customers a tribal tax that was not approved by the Department of the Interior. Pet. App. 31 (FOF ¶ 50); *id.* 145 (FOF ¶ 120). This concern was addressed in a lease amendment between the parties entered into during July 1982, which was approved by the Department on September 29, 1982, and by obtaining an oral commitment of the Tribe's attorneys to secure

[3] The district court's finding on this issue was supported amply by the record. The Tribe's second amended complaint filed in 1978 referred to the Secretary's nonapproval, as did Westmoreland's answer to the latter. J.A. 97-98, 108. The Tribe's attorneys, moreover, prepared a legal analysis in April 1982 which noted the pendency before the Department of an amendment to the Tribe's constitution to permit ceded strip taxation and which observed that "[i]f the amendment to the constitution is not approved, the result will be to foreclose any severance tax on ceded strip coal" should the state taxes be invalidated. J.A. 134.

secretarial approval of a constitutional amendment extending tribal taxation authority to the ceded strip. Pet. App. 32-35 (FOF ¶¶ 51-54); *see also* J.A. 388-89. Under the lease amendment, Westmoreland agreed to pay the Tribe a tax equal to the aggregate amount of the Montana severance and gross proceeds taxes, less what actually was paid to the State or Big Horn County. J.A. 136; *see also* Pet. App. 32-33 (FOF ¶ 51). The amendment additionally contained a waiver provision stating that "[c]ompliance with the terms of this Agreement shall satisfy any obligation which Lessee may have now or at any time hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter, and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided in the lease as amended." J.A. 136. The 1982 lease amendment thus was intended to establish a prospective, contractually grounded "tax" obligation on Westmoreland's part to the Tribe not amenable to unilateral modification by the Tribe. Pet. App. 32 (FOF ¶ 53).

Shortly after the Department of the Interior's approval of the lease amendment, the Tribe and Westmoreland moved under Fed. R. Civ. P. 67 for leave to deposit its severance tax payments into the district court's registry pendente lite, and the Tribe simultaneously requested issuance of a preliminary injunction against enforcement of the severance tax. CR 114, 118. The district court granted both motions in January 1983, and no further severance tax payments were received by Montana with respect to Westmoreland's ceded strip production of coal subject to the tribal lease. J.A. 211. Westmoreland continued to make gross proceeds payments to

Big Horn County until November 1987 when, following issuance of the court of appeals' decision in *Crow II*, the district court directed all further payments to be made into its registry. CR 326, 330. Westmoreland deposited $23.9 million in severance and gross proceeds tax payments pursuant to the preliminary injunctions. J.A. 332. The escrowed funds, including interest and less payments to certain tribal creditors, were distributed to the United States in trust for the Tribe after the taxes were invalidated in *Crow II*. CR 429, 430, 457, 458, 559.

V. THE PROCEEDINGS BELOW

A. *Crow I* and *Crow II*

As noted, the Tribe initiated this litigation in 1978 by challenging application of Montana's coal taxes, inter alia, to coal mined by Westmoreland in the ceded strip. The district court dismissed the complaint for failure to state a claim, but the Ninth Circuit reversed. *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir.) ("*Crow I*"), *cert. denied*, 459 U.S. 916 (1982). However, in so holding, the *Crow I* court observed, in words which have become rather hollow, that, "[a]s to the taxes already paid by Westmoreland, . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d at 1113 n.13 (Pet. App. 186 n.13).

Following the remand and trial, the district court concluded that the taxes were not preempted and did not impair tribal sovereignty. *Crow Tribe v. Montana*, 657 F. Supp. 573 (D. Mont. 1985) (Pet. App. 110). In so ruling,

the district court found that there was "no convincing evidence that the state's taxes affected the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland" (Pet. App. 145 (FOF ¶ 123)); that there was "no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal" (*id.* at 146 (FOF ¶ 129)); and that "[t]he royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner" (*id.* (FOF ¶ 126)).

Despite leaving these factual findings undisturbed, the Ninth Circuit again reversed the district court. The court reasoned that Montana's taxes were invalid because the State "failed to rebut evidence that the taxes had at least some negative impact on the coal's marketability" and that "[a]ny finding of interference [with federal and tribal interests] would be enough to subject the state taxes to preemption" absent the existence of "legitimate" state interests which the taxes were "narrowly tailored" to achieve. *Crow II*, 819 F.3d at 900, 902 (Pet. App. 100, 105). The court of appeals used the same rationale to conclude that the state taxes infringed impermissibly on the Tribe's sovereignty. *Id.* at 902-03 (Pet. App. 105-07). This Court approved that decision summarily. *Montana v. Crow Tribe*, 484 U.S. 997 (1988) (Pet. App. 87).

B. *Crow III*

The Tribe first advanced a claim seeking recovery of Westmoreland's severance and gross proceeds tax

payments in its third amended complaint filed after the remand from the court of appeals in *Crow I*. J.A. 142. The district court had no need to address that or other claims for retroactive relief in its decision following the first trial because it upheld the taxes' validity. Pet. App. 110. Following *Crow II*, however, the question of retroactive relief became relevant.

In October 1989 the Tribe filed its fourth amended complaint that consisted of two claims for relief: an action in assumpsit for money had and received seeking recovery of Westmoreland's tax payments previously made to petitioners, and an action for imposition of a constructive trust on all such payments. Pet. App. 258-60. Both claims alleged that the Tribe was entitled to recoup the tax payments by virtue of tribal taxation codes and agreements with Westmoreland. Pet. App. 258-59. The brief filed in support of the motion to amend stated that a purpose of the proposed complaint was "to clarify Plaintiff's theories with respect to the remaining issues." CR 476 at 1. The United States, which had intervened as a plaintiff in June 1983 (CR 149), lodged its first amended complaint in March 1990 adopting almost verbatim the Tribe's fourth amended complaint except for a request that any recovery of Westmoreland's tax payments be awarded to the United States in trust for the Tribe. Pet. App. 243.

Petitioners' motion for summary judgment with respect to the amended complaint was denied in December 1990. Pet. App. 67. In rejecting the contention that the amended complaint failed to state a claim, the district court reasoned that the Tribe's restitution allegations must be resolved under federal common law principles,

which required the Tribe to establish "1. a wrongful act; 2. specific property acquired by the wrongdoer . . . traceable to wrongful behavior; [and] 3. . . . a reason, in equity and fairness, why the person holding the property should not be allowed to keep it." Pet. App. 81. The court reasoned further that "[i]t is a question of fact where the equities lie in this case . . . [and] whether a remedy in restitution arises at all" and identified several factors it deemed particularly germane:

> The court of equity must consider and balance such equitable factors as the amount of money collected by the State, whether the Tribe would have collected similar amounts but for the State tax, the amount of money that the State channeled to services enriching the Tribe, and so on. Only upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds.

Pet. App. 84. The court subsequently granted petitioners' motion requesting certification of the order for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 61.

The court of appeals, after initially granting leave to appeal, concluded in July 1992 that such leave had been given improvidently and dismissed the appeal. *Crow Tribe v. Montana*, 969 F.2d 848 (9th Cir. 1992) (per curiam) (*"Crow III"*) (Pet. App. 58). It nonetheless issued an opinion discussing briefly the fundamental question of whether the Tribe had a right to recover taxes it never paid. Relying on its previous finding that the taxes had "at least some negative impact" on the Tribe's ability to collect royalties – but not addressing its prior conclusion

in *Crow I* that the Tribe is "not entitled to any refund if the tax statutes are declared invalid" – the panel stated that the "duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" was established in *Crow II*. 969 F.2d at 848 (Pet. App. 58). The court did not explain how the reasoning in its earlier decision on the issue of pre-emption controlled its decision on the entirely distinct question of whether the Tribe could state a claim for quasi-contractual relief. It also did not explain why the fact the Tribe suffered "at least some negative [economic] impact" entitled it to recoup an amount equal to *all* of Westmoreland's tax payments.

C. *Crow IV*

On remand and after a second trial, the district court rejected respondents' quasi-contract claim. It found that, even had the state taxes not been imposed, Westmoreland would not have paid the tax imposed under the Tribe's 1976 taxation code because the code's application to the ceded strip had not been approved by the Department of the Interior and because the tax therefore could not be passed on to Westmoreland's utility customers. Pet. App. 35 (FOF ¶ 57); *id.* 51-52 (COL ¶ 30). The court found further that petitioners provided substantial services to the Reservation and its residents and reiterated its 1985 findings that Montana and its local subdivisions provide essentially all governmental services on the ceded strip. Pet. App. 37-38 (FOF ¶¶ 62-63, 65); *id.* 47-48 (COL ¶¶ 18, 20); *id.* 128-31 (FOF ¶¶ 56-70). Tribal members residing on the reservation thus have access to the same state services

as other residents living on or off the Reservation, and over an 18-year period between 1975 and 1992 the cost of state services provided to tribal members was estimated conservatively at $79 million. Defs. Ex. 511 at 55. Other evidence showed that tribal members residing within Big Horn County received county and school district services between 1975 and 1987 with an estimated cost of $25.4 million. Defs. Ex. 614 at 2.

Turning to the question whether respondents had established a viable quasi-contract claim, the district court concluded that Montana and Big Horn County had received Westmoreland's tax payments pursuant to a then-existing lawful obligation; that the obligation was independent of any which Westmoreland might owe the Tribe; that Westmoreland did not initiate available state law proceedings to recover the severance and gross proceeds taxes; and that the Tribe, presumably with respect to the 1983-87 gross proceeds tax payments made subsequent to the 1982 lease amendment, could have redressed, but did not, Westmoreland's failure to initiate state refund procedures "by proceeding against Westmoreland or . . . contract[ing] with Westmoreland to initiate such appropriate action to recover the Montana taxes." Pet. App. 50-51 (COL ¶¶ 27, 28). The district court observed that accepting respondents' theory "would allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot." Pet. App. 9 (COL ¶ 28).[4]

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[4] The district court additionally rejected a claim by the Tribe and the United States that "restitution damages" should be awarded with respect to alleged interference with a

The Ninth Circuit reversed the district court, holding that denial of equitable relief in the form of restitution of Westmoreland's tax payments was an abuse of discretion because "[t]he equities in favor of restoring improperly collected revenue to the entity entitled to receive them are strong" and remanding "for entry of an order directing the State and County to disgorge the improperly collected taxes" and to resolve respondents' claim for prejudgment interest which they claimed at trial to be $315 million as of January 1994. *Crow Tribe v. Montana*, 92 F.3d 826, 830 (9th Cir. 1996) (per curiam) (*"Crow IV"*) (Pet. App. 12); *see* Pls. Ex. 319 at Table 3.1. The court of appeals based the reversal on the trial court's failure "to give appropriate weight to the law of this case as established in the three prior appeals" – two of which addressed the issue of preemption and the third of which relied on the first two. *Id.* at 828 (Pet. App. 8).

Most importantly, the Ninth Circuit rejected the district court's reliance on the fact that the Tribe had not paid the taxes at issue as a basis for denying relief as "in effect reinstat[ing] the privity requirement we had already rejected in *Crow III*." *Crow IV*, 92 F.3d at 829 (Pet. App. 9). The court of appeals then held "the Tribe stated a claim for equitable relief *despite the absence of traditional*

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contractual or business relationship between the Tribe and Shell Oil Company involving possible development of an on-reservation coal mine. Pet. App. 38-42 (FOF ¶¶ 66-81); *id.* 54-57 (COL ¶¶ 36-46). This aspect of the district court's judgment was affirmed on appeal (Pet. App. 12-14), and the Tribe's cross-petition for writ of certiorari on the issue has been denied (*Crow Tribe v. Montana*, 118 S. Ct. 73 (1997)).

requirements for relief under theories of assumpsit or constructive trust; that is, even though there was no privity and even though the Tribe itself had not paid the taxes to the State." *Id.* at 828 (Pet. App. 8) (emphasis added). The court next found mistaken petitioners' reliance on *United States v. California*, 507 U.S. 746 (1993). The court distinguished that decision in a footnote which, as modified in response to Montana and Big Horn County's petition for rehearing, stated in part:

> California could only be liable if it were somehow responsible for the wrongful act of a third party and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach. . . .
>
> *California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had voluntarily agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," . . . and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor].

Crow IV, 92 F.3d at 828 n.2 (Pet. App. 8-9, 16) (citations omitted).

SUMMARY OF ARGUMENT

I. Respondents initially sought recovery of Westmoreland's severance and gross proceeds tax payments under a common law claim for money had and received, or quasi-contract. That claim has been foreclosed by this Court's unanimous decision in *United States v. California*, 507 U.S. 746 (1993). There, this Court held that the United States could not maintain a quasi-contract claim with respect to state taxes imposed on a federal contractor and for which the contractor was reimbursed contractually by the United States. It reasoned in relevant part that the United States' obligation to reimburse the federal contractor for tax payments did not give rise to a claim in quasi-contract on the Government's part against California and that the relationship between California and the actual taxpayer was adverse – i.e., "that of creditor and debtor." *Id.* at 756. Under those circumstances, the Court refused to "imply [the] contract in law between California and the Government" necessary to establish a quasi-contractual relationship.

California applies with full force here. Like the federal contractor there, Westmoreland not only was the taxpayer but also "has had its day in court and gone home" (*California*, 507 U.S. at 752) by paying the state taxes without initiating state-law refund procedures and by entering into a settlement agreement with petitioners. Like the federal contractor, moreover, Westmoreland did not steal money from the Tribe and pay it to petitioners. The relationship between petitioners and Westmoreland instead was "adverse" in the same fashion as the relationship between the State and the taxpayer in *California*.

The reasons which the Ninth Circuit offered to distinguish *California* do not withstand even cursory scrutiny. The court of appeals relied on the fact that the California tax had not been deemed unlawful, while the Montana taxes have been held preempted, but that fact was immaterial to whether a viable quasi-contract claim was stated. Although it is clear the allegation that California had acted illegally in assessing the tax was central to the United States' complaint (507 U.S. at 749), the Court did not need to reach the issue because of its ruling that there was no cause of action available for the United States to proceed, even were the State's tax manifestly illegal. No less unhelpful was the court of appeals' other basis for distinguishing *California*: respondents had not sought to recover Westmoreland's tax payments as the latter's assignees or subrogees. The absence of such a claim instead removes the very basis upon which the United States sought quasi-contract recovery in *California* and, if anything, renders respondents' quasi-contract claim here even weaker than the United States' there.

II. Tellingly, respondents abandon entirely the reasoning offered by the Ninth Circuit and advance two different arguments as to why *California* does not apply here. First, respondents contend that *California* extends only to quasi-contract claims with respect to taxes alleged to be unlawful under state, as opposed to federal, law. This is an irrelevant distinction. The difficulty with the quasi-contract claim in *California* was not that it was based on state law but that the relationship between the United States and the State was not one that would allow the United States to recover taxes it did not pay.

Respondents alternatively attempt to justify the Ninth Circuit's judgment on the theory that the federal courts have inherent equitable remedial authority to award the relief sought here. As an initial matter, the remedy sought by respondents – an order forcing petitioners to turn over nearly $58 million in taxes collected long ago and prejudgment interest exceeding $300 million – is plainly legal, not equitable, in nature. And even assuming that such quasi-contract relief is equitable in nature, this Court has held that the exercise by federal courts of equitable remedial powers must be informed by, and be consistent with, common law principles. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1945). Any other rule means "us[ing] each equity chancellor's conscience as a measure of equity, which . . . would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot." *Lochner v. Thomas*, 116 S. Ct. 1293, 1298 (1996). Here, the only common law remedy available to recover the severance and gross proceeds taxes paid to petitioners lay in quasi-contract, and that remedy is foreclosed by *California*.

Aside from the utter irreconcilability of respondents' equitable authority argument with *California* and this Court's more general teaching on the use of such power, the federal-state comity principles underlying the Tax Injunction Act, 28 U.S.C. § 1341, counsel strongly against the existence of the virtually unfettered equitable discretion urged by respondents. *See, e.g., National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995). It is undisputed that they seek recovery of taxes paid by

another who had state-law remedies which were "plain, speedy and efficient" under § 1341 but bypassed those remedies. Permitting respondents to short-circuit those remedies cuts deeply into the salutary objective of § 1341 that recovery of taxes alleged to have been collected unlawfully occur in accordance with the involved State's internal procedures. This conclusion additionally is warranted by *National Private Truck Council* and *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), where the Court refused to extend the reach of 42 U.S.C. § 1983 to taxpayer claims in federal or state court in the face of adequate state-law remedies. It would be anomalous to conclude that a *nontaxpayer* can achieve the same result through exercise of a federal court's inherent equitable powers.

Finally, respondents' theory is particularly dangerous not only because it imposes a draconian, new form of liability on petitioners (and presumably on States in general) but also because it establishes an essentially standardless analysis by which the liability will be determined. Any finding of preemption thus would give rise to liability for taxes paid by a third party based solely on each court's individual notions of equity, unguided by any traditional common law standards. Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. For example, in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property,

remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The panel's approach invites just such a complex, case-by-case weighing of poorly defined considerations by the district courts that, as demonstrated by its own ruling, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN *CALIFORNIA*, RESPONDENTS CANNOT MAINTAIN A QUASI-CONTRACT CLAIM FOR RECOVERY OF THE STATE TAXES PAID BY WESTMORELAND.

The Ninth Circuit's decision allowing respondents to recover $58 million in taxes paid by Westmoreland to petitioners departs radically from settled principles governing recovery of taxes alleged to have been exacted unlawfully and effectively negates the procedures that Montana, and other States, have established to determine claims to such recovery. In an area of law where predictability of process is essential to maintaining the States' fiscal integrity, the court of appeals has introduced enormous uncertainty. The Ninth Circuit's decision, however, is not merely without precedent and potentially disruptive of state tax refund procedures; it is directly contrary

to this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

A. This Court's Decision in *California* Properly Applied Well-Established Common Law Principles and Held There Is No Cause of Action in Quasi-Contract to Recover Taxes Paid by a Third Party.

In opposing the motion for summary judgment filed in 1989 with respect to the fourth amended complaint, the Tribe characterized as "legalistic" petitioners' argument that only Westmoreland could recover the severance and gross proceeds taxes it had paid and commented that "[f]ortunately the equitable basis for money had and received and the equitable remedy of constructive trusts are available to prevent the injustice Defendants seek to establish." CR 503 at 19. The United States was equally explicit. CR 506 at 6 ("[t]here are two principal theories upon which we rely in asserting our right to restitution: a common law count of money had and received and the imposition of a constructive trust"). Respondents' reliance on quasi-contract theory is revealing and underscores what is now apparent after this Court's decision in *United States v. California*, 507 U.S. 746 (1993): They pursued a theory of recovery that was untenable from the inception.

1. The doctrine of quasi-contract developed as a system for awarding restitution in cases where neither tort nor contract remedies existed. It was based on the common law action for assumpsit – the enforcement of a promise. Although originally developed to enforce an

actually bargained for contract, assumpsit was subsequently expanded to include situations where a contract should be implied between parties as a matter of law. *See* Dan B. Dobbs, *Law of Remedies* § 4.2(d) (1993); Peter W. Davis, Comment, *Restitution: Concept and Terms*, 19 Hastings L.J. 1167 (1968); *see also Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923) (a "*quasi* contract" is a "fiction of law" whereby "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress"). By 1760, Lord Mansfield had established "unjust enrichment" as the basis for such actions. *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760) ("the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money"). "Although [Lord] Mansfield's description of quasi contract as 'equitable' has been repeated many times, this refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment." I George E. Palmer, *Law of Restitution* § 1.2, at 9 (1978).

As developed by the common law courts, quasi-contract principles did not give courts authority to remedy every claim of injustice, but remained "tied to the action in assumpsit and to the limited judicial powers of law judges." Dobbs at 581. In order to maintain an action for quasi-contract, a plaintiff has the burden of proving (1) a benefit conferred by the plaintiff to the defendant; (2) acceptance of the benefit by the defendant; and (3) that it would be unjust and inequitable for the defendant to retain the benefit conferred. *Restatement of Law of Restitution*, § 1, cmts., a & c (1937). A claim accordingly will lie in

quasi-contract only when the plaintiff can demonstrate a relationship with the defendant sufficient to allow a court to imply a contract between the parties that obligates the defendant to repay a benefit conferred by the plaintiff.

Claims in quasi-contract were eventually recognized at common law by this and other courts as a means for recovering illegal taxes paid under duress and protest. *See, e.g., Stone v. White*, 301 U.S. 532, 534 (1937); *City of Philadelphia v. Collector*, 72 U.S. 720, 731-32 (1866); *see generally* II Palmer § 9.16; Thomas M. Cooley, *Law of Taxation* 1487-90 (Albert Poole Jacobs ed., 1903). Recovery under this theory, however, was limited to the "payor." *Restatement of Restitution* § 75. The common law theory of recovery has been displaced in whole or part by many States, including Montana, with explicit statutory schemes that control recovery of taxes alleged to have been exacted unlawfully. II Palmer § 9.16, at 337.

2. It was against this basic framework that *California* was decided. There, the United States sought to recover $11 million in sales and use taxes alleged to have been assessed erroneously under state law on a government contractor, WBEC. 507 U.S. at 749. The contractor was compensated on a fixed-fee-plus-costs basis and reimbursed for the taxes through an "advanced funding" procedure under which it withdrew funds deposited into an account by the Government for the purpose of paying allowable costs, which included taxes. *Id.* The total amount of taxes claimed to have been assessed improperly was $14 million, and WBEC previously had settled its challenge to the assessment for $3 million and dismissed related state court refund actions without prejudice. *Id.*

The Court began its substantive analysis by noting the early use of the indebitatus assumpsit cause of action as a means for recovery of illegally imposed taxes, its replacement on the federal level by administrative and judicial remedies, and the fact that in prior cases only the actual taxpayer had advanced the quasi-contract claims. 507 U.S. at 751-52. The situation in *California* differed, however, because it was WBEC, not the United States, which was the taxpayer. The United States attempted to overcome this distinction by claiming that its obligation to reimburse WBEC created a quasi-contractual relationship with California so as to allow recovery.

This Court, however, found that distinction critical and unanimously rejected the United States' claim. It held that "[i]n this case . . . the taxpayer – WBEC – has had its day in court and gone home. The United States attempts to recover money it paid in reimbursement for state tax assessments against the contractor, even though the contractor already has challenged the assessment and accepted a resolution of its claims." 507 U.S. at 752. Consequently, even though it was obligated to indemnify WBEC, "the Government [could not] use the existence of [that] obligation . . . to create a federal cause of action for money had and received to recover state taxes paid by WBEC." *Id.* at 754.

The Court then found "inapposite" the Government's reliance on *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), which the United States contended stood for the proposition that it could recover in quasi-contract funds from a third party that "had been misappropriated from a government agent." 507 U.S. at 754-55. The Court explained those cases

"share[d] two features this case lacks": first, "the money passed from the first party [complainant] to the second party unlawfully;" and, second, "the rightful owner sued a third party who had a relationship that . . . made that party legally responsible for the actions of the one who unlawfully took the money." *Id.* This Court further explained why the absence of these features was controlling for purposes of determining the existence of a viable quasi-contract claim:

> The Government does not contend that WBEC stole the money at issue in this case or otherwise took the money from the Government unlawfully. WBEC did not. Nor does the Government contend that California and WBEC had a relationship that would make California liable for WBEC's actions. They did not. In fact, California and WBEC had an adverse relationship: that of creditor and debtor. California's demand that WBEC pay what California believed to be a lawful debt does not make California legally responsible for the Government's indemnification of WBEC. In these circumstances, we do not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State.

Id. at 756. The Court thus held in *California* that federal common law quasi-contract recovery is not available to a nontaxpayer, even where actual reimbursement has occurred, because two separate relationships are involved and because the taxing entity cannot be held responsible for whatever obligations the taxpayer may have with a third party.

B. This Case is Indistinguishable from *California*.

Application of *California* here is straightforward. First, like the United States in *California*, respondents alleged a quasi-contract cause of action to recover taxes they had not paid. Second, as in *California*, the party that actually paid the taxes "has had its day in court and gone home." 507 U.S. at 752. Westmoreland thus paid all of the taxes at issue without initiating any tax protest under the procedures provided by Montana law. Indeed, it entered into a settlement agreement with the petitioners where, in return for $50,000 consideration, it expressly waived any claim it might have against petitioners regarding the coal taxes.[5]

Third, just as in *California*, the *Bayne-Gaines* factors are not satisfied. Neither *Bayne* nor *Gaines* controlled the

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[5] There has been, and can be, no dispute that Westmoreland bore the legal incidence of the taxes and was the taxpayer. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850 (Mont. 1980), *aff'd*, 453 U.S. 609 (1981) ("the coal producers have the only vital stake in this case because they . . . are in fact the taxpayers"); *accord Crow I*, 650 F.2d at 1110 (Pet. App. 178, 179); *see generally* Walter Hellerstein, *State and Local Taxation of Natural Resources in the Federal System* 7-13 (1986) (discussing the early twentieth century controversy over the merits of production value-based as opposed to ad valorem in situ-based taxation of mineral extraction). The Tribe's position with respect to the Montana taxes accordingly was comparable for quasi-contract purposes to the United States' in *California*; i.e., the taxes did not invade the *Tribe's* immunity from state taxation, just as the California tax did not invade the United States' immunity. *See United States v. New Mexico*, 455 U.S. 720 (1982); *Ute Indian Tribe v. State Tax Comm'n*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978).

outcome in *California* because WBEC had not stolen the money it used to pay the taxes and because WBEC and the State had an "adverse relationship." The same is true here. Westmoreland did not steal money from the Tribe and pay it to petitioners. Likewise, Westmoreland as a taxpayer had an adverse relationship to petitioners. In fact, Westmoreland intervened early in the litigation to support the Tribe's challenge to the State coal taxes (*see, e.g.*, J.A. 105), going so far as to file in November 1982 a joint motion requesting an order directing their deposit into the district court's registry and a supporting brief. CR 114, 115. Westmoreland, in short, was a highly sophisticated economic actor whose conduct was directed at protecting its own interests.

C. The Ninth Circuit's Effort at Distinguishing *California* Does Not Withstand Scrutiny.

The court of appeals found *California* inapposite for two reasons: "there was no finding that California had wrongfully or illegally collected taxes," and the earlier case "involved an entirely different case" where the "Government, unlike the Tribe, was 'in no better position than as a subrogee of its contractor.' " *Crow IV*, 92 F.3d at 828 n.2 (Pet. App. 8 & 16). Neither justification for refusing to hold *California* controlling is tenable.

That California had not been determined to have assessed WBEC's property unlawfully before summary judgment was granted the State was immaterial to whether a viable quasi-contract claim existed. The Government contended WBEC had been assessed improperly under state law, but its claim for relief was rejected by

each federal court reviewing the claim for reasons unrelated to whether California taxing officials in fact had erred in their assessment. *California*, 507 U.S. at 749-50; *United States v. California*, 932 F.2d 1346, 1347 (9th Cir. 1991), *aff'd*, 507 U.S. 746 (1993). Instead, insofar as the United States' quasi-contract claim was involved, the decision turned on the settled common law principles that were unconcerned with the validity of the assessments. There was consequently no need to reach the question of whether the California tax had been imposed improperly because, even had the United States' allegation been true, the Government still lacked a viable cause of action.

The panel's second attempt to distinguish *California* fares no better than the first. If anything, respondents' claim is even *weaker* than the United States' claim in *California*. There, the United States at least could claim subrogation rights because of its contractual obligations to WBEC. 507 U.S. at 756-59. This Court nonetheless ruled against the United States on that basis, holding that " 'the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assigner, which public policy does not forbid.' " *Id.* at 758 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938)). Here, in stark contrast, a subrogation claim neither has been asserted nor could be asserted in the absence of reimbursement of Westmoreland by the Tribe for the severance and gross proceeds tax payments. The Tribe instead made *no* contribution to Westmoreland's tax payments; if any entity here was even remotely comparable to the United States in *California*, it was Westmoreland's utility customers to whom the taxes were passed

on contractually. Therefore, even had Westmoreland instituted a successful refund proceeding, the Tribe would have not been entitled to any share of the refund. The suggestion by the Ninth Circuit that the respondents' position is somehow enhanced by their disclaiming any intent to stand in Westmoreland's shoes stands *California* – and logic – on its head.

II. RESPONDENTS CANNOT EVADE *CALIFORNIA* ON THE GROUNDS THAT A VIOLATION OF FEDERAL LAW IS CLAIMED AS THE BASIS FOR QUASI-CONTRACT RELIEF OR THAT A REFUND OF WESTMORELAND'S TAXES WAS AN APPROPRIATE EXERCISE OF THE NINTH CIRCUIT'S EQUITABLE REMEDIAL DISCRETION.

Declining to defend the court of appeals' rationale, respondents first argue that *California* is inapposite because it turned on the issue of "whether the Court should recognize a cause of action under federal common law permitting the United States to recover state taxes it claimed its contractor should not have been required to pay as a matter of *state law*." U.S. Opp'n 15 (emphasis added); *see also* Tribe Opp'n 19-20. Hence, respondents claim that *California* does not apply because "unlike the present case, *California* involved a state tax that was not claimed to violate federal law." U.S. Opp'n 16. They next argue that *California* is not dispositive because what is involved here is merely an appropriate exercise of a federal court's inherent power to award equitable relief. Neither theory is any more persuasive than the Ninth Circuit's efforts at escaping the reach of *California*.

A. The Fact That *California* Involved a Tax Alleged Invalid Under State, Rather Than Federal, Law is Irrelevant.

Respondents' argument that *California* creates, in essence, a rule precluding federal common law quasi-contract recovery only where a state law violation is at stake suffers from the same flaw as the Ninth Circuit's view that *California* is inapplicable because there no violation of law had been established. The distinction respondents offer is simply irrelevant, and it is therefore unsurprising that they were unable to cite any language from *California* indicating that the Court considered such a difference to be pertinent, let alone dispositive. Rather, as explained above, what mattered to this Court in *California* was that WBEC had an "adverse" relationship with California and the State's demand that WBEC pay its taxes did not create an obligation for the State to indemnify the United States – facts that are equally true here. *California*, 507 U.S. at 756 ("[i]n these circumstances, we do not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State").

Respondents' argument also is opposed diametrically to that the United States advanced in its *California* submissions to this Court. There, it argued that "[t]he court of appeals erred in suggesting . . . that the fact the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case," since "[t]he federal cause of action for money had and received applies whenever federal funds have been 'wrongfully, erroneously, or illegally paid.' " Brief

for United States at 24, *United States v. California*, *supra* (No. 91-2003); *see also id.* ("[t]he remedy [of money had and received] is not limited to situations where the State's action violates the Constitution"). The Government was correct in *California* in this respect, and the Court should squarely reject its new litigation posture.

B. Federal Courts Cannot Circumvent *California* by Purporting to Exercise Their Inherent Equitable Authority.

Respondents' erroneous belief that *California* is inapposite because it did not involve a tax that was illegal under federal law also infects their alternative argument that *California* is distinguishable because this case simply concerned the authority of the federal court to award relief once a claim has been proven. *See, e.g.*, U.S. Opp'n 17 ("The relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law."); Tribe Opp'n at 17 ("The Ninth Circuit simply did what federal courts have been doing '[f]rom the earliest years of the Republic,' exercising their equitable powers to remedy the invasion of federally secured rights."). Even if this Court assumes the relief awarded here is "equitable" in nature – and it is not – this Court's decisions discussing the scope of a federal court's discretion in fashioning such relief provides no basis for respondents' extravagant claim. This is particularly true where, as here, the relief ordered concerns core issues of state sovereignty and the structure of "Our Federalism" which lies at the heart of the Constitution.

1. By arguing that the panel's decision was simply an exercise of the court's equitable powers, respondents have attempted to distract this Court from the fact that the relief they originally sought was legal in nature. As explained above, quasi-contract was a form of action that developed at *law*, not in equity, to remedy a breach of a judicially implied contract. *See also* John P. Dawson, *Unjust Enrichment* 10-26 (1951). That the remedy awarded by the court of appeals is legal, rather than equitable, is clear on its face: The court not only ordered respondents to pay $58 million in funds that have long since been collected and largely spent but also directed the district court to resolve respondents' claim to over $300 million in prejudgment interest.[6]

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[6] Even the Ninth Circuit did not purport to award "equitable relief." Although its opinion stated that the court was deciding the case by "the process of weighing the equities in favor of and against restitution" (*Crow IV*, 92 F.3d at 828 (Pet. App. 8)), this description appears to have referred to the panel's analytical approach to resolving the merits of the case rather than the true nature of the remedy awarded. Nevertheless, to the extent the contrary may be true, it remains settled that quasi-contract is an action at law. Respondents' request for a constructive trust additionally did not alter the substantive claim at issue here, since imposition of a constructive trust is properly viewed as a form of remedy, not a substantive cause of action, through which specific property is returned to the rightful owner. *See generally* I Palmer § 1.4 at 17; *Restatement of Restitution* § 160, cmt. a. As discussed earlier, over 60 percent of the severance taxes and all of the gross proceeds taxes were spent immediately, a fact at the least making a constructive trust an inappropriate vehicle for requiring "disgorge[ment]" of the *entire* $58 million in taxes paid by Westmoreland or directing the district court to consider the prejudgment interest claim on remand. Even as to a traceable corpus, a plaintiff suing in

The availability of a legal remedy is dispositive. Because there was a well-established legal remedy for the harm of which they complained, respondents are not entitled to equitable relief. "It is a fundamental principle of long standing" that a court cannot grant equitable relief "as long as an adequate remedy at law is available." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.22 (1985); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992) ("[i]t is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law") (citations omitted). Put simply, a complainant is not entitled to request a court to exercise its equitable powers simply to relieve it of the burden of meeting the requirements of an existing, available legal cause of action. Here respondents repair to notions of equitable relief precisely because they have tried, and failed, to establish any entitlement to precisely the same relief under a claim arising at law.

2. Even if the quasi-contract relief sought by respondents could be considered as equitable in nature, however, they have failed to prove the predicates for such relief. Their theory of recovery consequently can succeed only if they are correct in asserting that a federal court may award relief of the kind sought here whenever, in the exercise of its discretion, it believes "disgorge[ment]" of

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constructive trust must satisfy the same elements that condition quasi-contract relief and is entitled only to a constructive trust remedy when the legal relief available in quasi-contract is inadequate. *Restatement of Restitution* §§ 1.3, cmt. c & 160, cmt. e.

taxes to a nontaxpayer will avoid an unfair result notwithstanding the inability of the taxpayer itself to recover the taxes. Although the United States characterizes this claim as "nothing novel" (U.S. Opp'n at 19), it is squarely contrary to this Court's precedent and well-established equity jurisprudence.

It is axiomatic that although "[t]he remedial powers of an equity court must be adequate to the task . . . they are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Rather, "the scope . . . of relief is dictated by the extent of the violation *established*." *Califano v. Yamasaki*, 443 U.S. 682, 701 (1979) (emphasis added); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 418 (1977); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971). And where, as here, the equitable remedy will "intrude into the proper sphere of the States," particularly its taxation activities, a court's equitable power should be exercised "only sparingly, subject to clear rules guiding its use." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

Applying these principles, this Court has held that even when a federal right is shown to have been violated, "it by no means follows that the plaintiff . . . is relieved of the burden of establishing the traditional prerequisites to relief." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975). Hence, "the conclusion that a private litigant could maintain an action for violation of [a federal statute] mean[s] no more than that traditional remedies [are] available to redress any harm which he may have suffered; it provide[s] no basis for dispensing with the showing required to obtain relief." *Id.*

In reaching this holding, the Court relied upon *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), where the issue was the availability of rescission and restitution of consideration paid as a remedy under the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, for the alleged fraudulent sale of securities. It found the remedy available because "the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce . . . in designated courts by such legal or equitable actions as would normally be available to him." *Id.* at 287-88. Consequently, after noting the authority of specified courts under 15 U.S.C. § 77v(a) to entertain all suits in equity or at law to enforce the statute, the Court reasoned that "[i]f [the complainant's] bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires." *Id.* at 288. The Court then reviewed the complaint's allegations and determined, inter alia, that they satisfied common law standards for rescission on the basis of fraud. *Id.* at 288-89.

And just last year, this Court in *Lochner v. Thomas*, 116 S. Ct. 1293, 1298 (1996), held that simply because a court is exercising its equitable powers, it cannot "ignore [the relevant] body of statutes, rules and precedents." Instead, the Court made clear that "courts of equity must be governed by rules and precedents no less than courts of law." *Id.* (quoting *Jenkins*, 515 U.S. at 127 (Thomas, J., concurring)). "[T]he alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot."

Id. (citing 1 J. Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886)); *cf. Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (holding that in a damages action brought under 42 U.S.C. § 1983, common law rules of tort " 'defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry' ") (quoting *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

In sum, a federal court's remedial powers, even when federal constitutional or statutory provisions are alleged to have been violated, must be exercised by reference to standards rooted in history and tradition. Here, respondents ask this Court to fashion a remedy not merely without precedent but also in utter conflict with the most apposite decision of this Court, which itself is based on a rich history of quasi-contract law.[7]

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[7] This Court's statement in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-67 (1992), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," relied on heavily by respondents (U.S. Opp'n 16-17; Tribe Opp'n 17, 21-22), is not to the contrary. The issue here is whether the remedy respondents did seek and the Ninth Circuit granted – quasi-contract recovery of Westmoreland's tax payments – *is* "available." The mere fact that the Tribe could have been injured economically in some amount which for strategic reasons respondents made no attempt to prove does not mean, as is seemingly their argument, that they are entitled to Westmoreland's tax payments. And as explained above, they wholly fail to meet the standards for such relief as spelled out in this Court's decision in *California*.

3. The unprecedented expansion of federal court equitable remedial authority advocated by respondents is singularly pernicious in the context of what, in practical effect, is a tax refund claim. In liberally applying the Tax Injunction Act, 28 U.S.C. § 1341, this Court long has recognized judicial and congressional "aversion to federal interference with state tax administration." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995); *see also Arkansas v. Farm Credit Servs. of Cent. Ark.*, 117 S. Ct. 1776, 1779 (1997); *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-99 (1943); *Matthews v. Rodgers*, 284 U.S. 521, 524 (1932); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975) (when "confronted with requests for [equitable] relief [with respect to core state functions], [Article III courts] should abide by standards that go well beyond those of private equity jurisprudence"). Section 1341 and the federal-state comity principle animating it thus are concerned with protecting "[t]he States' interest in the integrity of their own [tax refund] processes." *Farm Credit Servs.*, 117 S. Ct. at 1780. Regardless of the inapplicability of § 1341's jurisdictional bar to the Tribe's or the United States' claims (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966)), the statute's underlying purpose of preventing unnecessary federal court intervention into state taxation matters would be directly frustrated by accepting respondents' view of the federal judiciary's remedial powers.

It is undisputed that respondents are seeking taxes paid by an entity whose own claims were precluded from federal court resolution because "a plain, speedy and efficient remedy [could have been] had in the courts" of Montana. It is additionally undisputed that, had Westmoreland pursued those remedies and recovered its severance and gross proceeds tax payments, the claims here neither could nor would have been brought. In a real sense, therefore, the recovery sought by respondents is derivative of the very fact that Westmoreland's claim to the taxes has been foreclosed by, inter alia, its failure to follow state law refund statutes. To permit respondents to short-circuit these statutes runs squarely contrary to § 1341's underlying policy of allowing States to devise and implement procedures which, consistent with due process or other constitutional constraints, are best suited to avoiding fiscal embarrassment or prejudice and expeditiously resolving taxpayer challenges. *Cf. Bush v. Lucas*, 462 U.S. 367, 388 (1983) (the question is "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue").

This commonsense conclusion is also dictated by the Court's decisions in *Fair Assessment* and *National Private Truck Council*. In *Fair Assessment* the Court held that 42 U.S.C. § 1983 did not authorize taxpayer damages-claim suits in federal court where an adequate state law remedy existed, while in *National Private Truck Council* it determined that taxpayer challenges were not cognizable under 42 U.S.C. § 1983 even if brought in state court for

prospective relief. In the latter case, this Court reasoned that "we must interpret § 1983 in light of the strong background principle against federal interference with state taxation" (515 U.S. at 589) and found the "silence" in § 1341 concerning state court remedial authority "irrelevant" to the outcome of the case because "the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation" (*id.* at 590). It confounds logic to contend, as respondents do, that federal courts should exercise their inherent equitable power to create a remedy for a nontaxpayer that this Court has refused to infer from otherwise broad congressional authorization for suit over claims of constitutional torts. It instead is clear that respondents cannot accomplish through their reliance on the general notions of the federal judiciary's equitable remedial powers that which has been foreclosed under traditional quasi-contract principles in *California*.

4. Finally, under the theory advanced by respondents, a determination that a State tax of Indian country is preempted would permit a court, as a matter of law, to hold a State liable for the taxes paid to it by third parties, with the involved court having the essentially standardless discretion to determine when to order the refund. The remedial power they propose not only is draconian but also does violence to this Court's attempts to establish a measure of certainty in Indian country tax matters.

The complexity associated with preemption issues in Indian country in general, and here in particular, make respondents' theory harsh. Over the past 25 years, this Court has developed a substantial body of decisional authority establishing the standards which are to be used

in determining the validity of state taxes imposed on nonmembers, but only two of these decisions were issued prior to 1975.[8] The Ninth Circuit's preemption analysis in *Crow I* and *Crow II* thus was guided primarily by this Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), handed down five years after the Montana taxes were adopted. Indeed, the case most relevant to the preemption issue here, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), was decided after this Court's summary affirmance of the *Crow II* judgment.

The reasoning in *Cotton Petroleum*, moreover, conflicted directly with that in *Crow II* in at least two important ways. First, this Court recognized in *Cotton Petroleum* that it was "reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate" but

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[8] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indians*, 498 U.S. 505 (1991); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Department of Tax. & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

then reasoned that "any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects . . . is simply too indirect and too insubstantial to support Cotton's claim of pre-emption." 490 U.S. at 186-87. The Ninth Circuit, in contrast, found fault with Montana because it did not "rebut evidence that the taxes had at least some negative impact on the coal's marketability," observed that the district court "did not find the impact of the taxes to be negligible," and concluded that "[a]ny finding of interference . . . would be enough to subject the taxes to preemption." 819 F.2d at 900 (Pet. App. 100). Second, *Cotton Petroleum* made clear that in determining the state governmental services relevant to the preemption issue, all services provided to the affected reservation are appropriately considered and rejected the contention that *White Mountain*'s standards "impose[] a proportionality requirement on the States" (*id.* at 185). The Ninth Circuit, however, limited consideration of the state services relevant to the preemption question to those related to Westmoreland's mining operation, criticizing petitioners for failing to show a "carefully tailored relationship between the severance tax revenues and the coal-related services" (819 F.2d at 901-02 (Pet. App. 104)).[9]

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[9] Petitioners recognize that in *Cotton Petroleum* this Court distinguished in part its summary affirmance of *Crow II* by noting that Montana's "unique" coal taxes had been characterized as "extraordinarily high" by the Solicitor General. 490 U.S. at 186 n.17. Even if the Solicitor General's assessment is accepted, it said nothing about the effect of the taxes on the marketability of Westmoreland's coal or, for that matter, on the marketability of the Tribe's coal in general. The district court, whose factual findings were left undisturbed by the court of

Complicating the preemption analysis here was the threshold question of whether the special Indian country preemption standards applied at all, since the ceded strip lies outside the Crow Reservation (*see supra* note 1), and whether the authorization of state taxation in the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, applied to leases entered into pursuant to the 1938 Indian Mineral Leasing Act. The first issue implicated the applicability of a decision of this Court, *Mescalero Apache Tribe v. Jones*, 411 U.S. 164 (1973), that *had* been issued before the taxes were enacted (*see* Pet. App. 155-56 (COL ¶ VI(b))), while the second issue was resolved in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), seven years after this litigation began.

Petitioners are not suggesting that the summary affirmance by this Court of *Crow II*'s judgment should be reconsidered. They nonetheless do suggest that the preemption issue here was quite complex and that the ultimate outcome of the preemption challenge was, as reflected by the reversals of the district court in *Crow I*

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appeals in *Crow II*, found that there was "no convincing evidence that the state's taxes affected the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland" (Pet. App. 145 (FOF ¶ 123)) and that there was "no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal" (*id.* 146 (FOF ¶ 129)). Westmoreland's president also testified during the second trial that "he could not identify any utility contracts lost during the relevant time period due to Montana's coal taxes." Pet. App. 29 (FOF ¶ 40). Both the district court and the Ninth Circuit, finally, rejected respondents' claim that the Montana taxes had interfered with the contractual or business relationship between the Tribe and Shell Oil Company with respect to development of on-reservation coal deposits. *Crow IV*, 92 F.3d at 830 (Pet. App. 12-14); Pet. App. 54-57 (COL ¶¶ 36-46).

and *Crow II*, far from certain. Respondents' theory is therefore particularly dangerous because any finding of preemption would give rise to recovery by third parties of monies paid by a taxpayer without protest based solely on the court's individual notions of equity, unguided by any traditional common law standards. Indeed, in this very case, the court of appeals rejected seriatim the district court's "equitable consideration" determinations, but it never overruled any of the lower court's factual findings or announced the substantive standards that should control the decision here. The only inference which can be drawn is that the Ninth Circuit felt that an injustice had been done to the Tribe and that, on balance, respondents rather than petitioners should have Westmoreland's tax payments. That type of reasoning plainly invites the "chancellor's foot" abuse warned against by this Court, since the outcome is controlled by no discernable standards other than the predilections of the particular appellate tribunal's members.

Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. For example, in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property, remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The panel's approach invites just such a complex, case-by-case weighing of

poorly defined considerations by the district courts that, as demonstrated by its own ruling, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be reversed.

Respectfully submitted,

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